Supreme Court, U.S.
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No. 98-1386

In The

Supreme Court of the United States

October Term, 1998

IN RE: SILICONE GEL BREAST IMPLANT PRODUCTS LIABILITY LITIGATION (MDL 926)

CAROL INGLE, et al.,

Petitioners,

v.

DOW CORNING CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

1. Respondent Steering Committee, having successfully contended before the Court of Appeals that the order challenged by petitioners was interlocutory, now urges, in the alternative, that this Court should deny the writ because petitioner failed to appeal from two earlier orders that addressed the imposition of assessments upon claimants involved in the MDL proceedings – in substance, an argument that petitioners were both too early and too late. The fact that the district court dealt with the subject on three successive occasions hardly commands the conclusion that petitioners, having refrained from seeking review of the first two orders, were estopped from appealing the third. As pointed out in the petition (pp. 3-5), the orders were entered at different stages of ongoing proceedings that produced successive settlement proposals and renewed opportunities to opt out. The orders, as applicable to petitioners, varied significantly in their particulars. It is petitioners' claim that the assessment imposed by the district court is excessive and unreasonable as applied to plaintiffs who opted out of the MDL proceeding. As stated in our petition (p. 14), the opt-out claimants question the propriety of imposing "the same levy upon those who accept the settlement approved by the MDL court and those who proceed independently," given that the latter will be heavily dependent upon local counsel and the conduct of further proceedings. In short, petitioners' grievance took shape by virtue of their opting out. It was after they opted out, and would no longer have connection with the MDL court, that that court's assessment levy took on the essential aspects of finality with regard to them.

2. The sole question before this Court is whether petitioners were erroneously denied the opportunity to secure review of the merits of the assessment order before the Court of Appeals that has exclusive appellate jurisdiction over the MDL court.

We have pointed out in our petition that relegating opt-out plaintiffs to the possibility of securing some form of review of the assessment issue in trial courts located in various parts of the country – transferor courts or courts in which negotiated settlements are reached – is almost certain to prove fruitless. Moreover, intervention by those fora, in the event it did occur, would invite conflict and confusion, with no ready means of resolution.

Strikingly, respondent makes no attempt whatever to address the problems generated by its position. It says simply that petitioners' appeal was from an interlocutory order. When, in its view, will the order have the requisite indicia of finality? How, when, and where will an opt-out plaintiff get her day in court on the claim that the MDL court's order subjected her to an unreasonably high assessment? Respondent suggests no avenue of review whatever.

The only practical answer is one that is readily justified by this Court's precedents. The order of the MDL court has conclusively determined the petitioners' liability under an assessment order providing compensation to the plaintiffs' steering committee. That determination is, of course, completely separate from the main issue in this products liability litigation, the right of plaintiffs to recover from the defendant breast implant manufacturers. There is no prospect of effective review before trial

courts scattered in various sections of the country. In addition, considerations of fairness and efficiency establish the appropriateness of review by the court of appeals that exercises jurisdiction over the MDL court. Finally, there is no question that the right at stake – a meaningful opportunity to pursue effectively one's guaranteed right of appeal – is of fundamental importance.

This case meets in every material respect the criteria developed by this Court in *Cohen v. Beneficial Industrial Loan Corporation* and its progeny. Failure to invoke *Cohen* in this situation will result in the denial of any practical route of appellate review on an issue – the alleged excessiveness of the MDL court's assessment – with respect to which plaintiffs have a conceded right to appellate consideration.

Respectfully submitted,

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